United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-1548

74-1548

United States Court of Appeals

For the Second Circuit.

IN THE MATTER
of
The Application of AAACON AUTO TRANSPORT, INC.,
Petitioner,

For the issuance of a Writ of Mandamus to

Hon. MORRIS E. LASKER, United States District Judge for the Southern District of New York

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF MANDAMUS

ZOLA and ZOLA
Attorneys for Petitioner
228 West 41st Street
New York, N.Y. 10036

Of Counsel:
RALPH J. ZOLA
RICHARD S. KAPLAN

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

QUESTIONS PRESENTED

1. Has Congress delegated exclusively to the District Court the jurisdiction to determine the issues in the action below - viz, to determine the making and validity of agreements to arbitrate disputes arising in interstate commerce?

2. If question 1 is answered in the affirmative, should a writ of mandamus issue directing the District Court to exercise its jurisdiction by trying forthwith any questions raised?

STATEMENT OF THE CASE

This is an application, pursuant to 28 USC Section 1651(a), the All Writs Act, and Section 27 of the Federal Rules of Appellate Practice, for a Writ of Mandamus, directing the Honorable Morris E. Lasker, Judge, United States District Court for the Southern District of New York, to decide a matter which was brought before him, entitled In the Matter of Certain Differences Between Aaacon Auto Transport, Inc., petitioner, and J. Wayland Thomas and Cora G. Thomas, respondents, being Civil Action 71 Civ. 3917 - M.E.L. Jurisdiction of the court was based on subject matter jurisdiction under the rules of the United States regulating commerce 49 USC Sections 3(2) and 6(7), 28 USC Section 1337 and 9 USC Sections 2 and 4, the Federal Arbitration Act.

After extensive briefing, the District Court expressly found that "subject matter jurisdiction of the petition is vested in this Court ... by 28 USC Section 1337 ... accordingly this Court also has jurisdiction under 9 USC Section 4." However, the court denied petitioner's motion to compel arbitration and held the petition in abeyance pending the outcome of an administrative proceeding previously commenced against petitioner by the Bureau of Enforcement of the Interstate Commerce Commission.

SUMMARY OF FACTS

Petitioner Aaacon is a motor carrier operating in interstate commerce throughout the continental United States.

In February 1971, J. W. Thomas and Aaacon Auto Transport, Inc. ("Aaacon") entered into an agreement to transport a vehicle in interstate commerce. The agreement provided, inter alia, for the arbitration of any dispute between the parties in New York. Thereafter, a dispute arose concerning alleged damage during shipment between Aaacon and the insurance company for the Thomases, Continental Insurance Co. ("Continental"). On August 31, 1971, Aaacon sought a determination of this dispute by arbitration and filed a petition to compel arbitration pursuant to 9 U. S. Code Section 4 in the Federal District Court for the Southern District of New York.

The petition to compel arbitration was opposed by the real part in interest, Continental, in the name of the Thomases, on the major ground that the provision for arbitration was in conflict with 49 U.S. Code 20(11), the Carmack Amendment, as discussed in the memorandum decision of Judge Lasker of June 14, 1973.

After extensive briefing on the issue, the Court on June 14, 1973 refused to grant Aaacon's motion to compel arbitration, holding the proceeding in abeyance pending the outcome of an administrative proceeding before the Interstate Commerce Commission in which, it was alleged, the validity of the arbitration provision would be considered in light of 49 U.S. Code 20(11). Aaacon was precluded at that time from appealing the Court's interlocutory decision inasmuch as the Court below did not dismiss the petition. John Thomson Beacon Windows Ltd. v. Furrow Inc., 232 F2d 366 (CADC, 1965).

Subsequent thereto, the Court below, being wrongly informed by Continental that an iterim report of a hearing examiner was a final decision of the Commission, refused reconsideration of Aaacon's motion to compel arbitration and suggested that Continental file a motion to dismiss the petition, which Continental did on December 18, 1973. Thereafter, on March 14, 1974, the Court, after noting its previous error, held that it would also defer action on Continental's motion to dismiss until the Commission had actually rendered a decision.

The ground for the decision of the Court below,

in holding its determination in abeyance, was that the doctrine of primary jurisdiction was applicable to the determination in question. The net effect of both decisions of the Court on Aaacon's motion to compel and Continental's motion to dismiss was to leave the parties in limbo pending action by the Commission.

Although Aaacon submits that the acts of the Commission are not relevant to the issues herein, it notes that the Commission had, by order of March 1971, commenced an investigatory proceeding against Aaacon. Two and a half years thereafter, on November 30, 1973, the hearing examiner served an interim report. It was this report which Judge Lasker at first erroneously considered a final determination by the Commission. The interim report did not consider any of the evidence submitted by Aaacon which consisted of over 1,100 pages of testimony and over 150 exhibits which are now to be considered in full for the first time by the Interstate Commerce Commission. The interim report did not cite any authority for its discussion of arbitration nor did it consider the prior Federal case law involving Aaacon and other carriers with regard thereto although such authorities were presented.

Additionally, Aacon has requested from the Commission an opportunity to provide additional and new evidence in that proceeding which the Commission by Division 1 has indicated will be considered "after the entry of the initial decision (of the hearing examiner) in this matter." In light of the fact that the Commission proceedings have been in progress for over three years, and that additional hearings are contemplated, and that a review of the entire record consisting of over 300 exhibits as well as over 2,000 pages of testimony will be had, it is not unlikely that a long period of time may elapse before a final determination is made by the Commission.

Moreover, nowhere in the original order of March 1971 or in any subsequent disclosure from the Commission was it indicated that the question of arbitration was being considered. Accordingly, it is doubtful whether or not the issue of arbitration is even properly before the Commission under the notice provisions of the Administrative Procedure Act, Section 558.

Also of interest is the fact that approximately one year after the investigatory proceeding concerning

Aaacon was commenced, the Commission rendered a decision in Ex Parte 263, 340 ICC 515 (1972), in which, as noted elsewhere in this brief, the Commission specifically upheld arbitration provisions in carriers' bills of lading and determined that no violation of, or inconsistency with, any provision of the Interstate Commerce Act existed with regard to arbitration. In accordance with the decision of Ex Parte 263 in September, 1973 Aaacon, as a party in Ex Parte 263, filed Rule 20 of its tariff with the Interstate Commerce Commission authorizing the arbitration provision here in question. Tariff Rule 20 was subsequently reviewed by the Chief of the Section of Tariffs of the Commission who required that the provision be made mandatory by requiring the use of language which would insure "positive application" in all cases of shipper claims. Annexed hereto for the convenience of the Court is a copy of the letter of the Chief of the Section of Tariffs of the Interstate Commerce Commission which was presented to the Court below.

In summary, Aaacon submits that the doctrine of primary jurisdiction is not applicable to the instant case because:

1) Congress has explicitly precluded the application of the doctrine of primary jurisdiction by the statutory requirement of speedy court trial;

2) Congress has explicitly precluded application of the doctrine by mandating jurisdiction to the Federal District Courts;

3) The question raised is purely one of law not requiring Commission expertise;

4) The issues which the Court has referred to the Commission have already been determined by the Courts.

Aacon ha additionally noted at the end of this brief that the venue of arbitration has also been preempted by Congressional enactment, and further that the arbitration provision in terms of the equities is appropriate and fair. Specifically, it does not burden either party inasmuch as arbitration may be had on documents alone, at the request of either party, without the necessity of either party traveling or transporting witnesses to New York, or even incurring the expense of representation by attorneys.

BASIS FOR APPLICATION

Petitioner is mindful of the reluctance of Appellate Courts to employ mandamus to review decisions which could later be reviewed in the normal course of appeal. However, there is need for such procedure and justification for its utilization when a normal course of appeal has been foreclosed.

Petitioner does not feel that Judge Lasker may be charged with arbitrary conduct or ursupation of power by his referral of this matter which he should decide, to an administrative agency which he erroneously concluded had the power to decide the matter or advise him of the premises.

Nor does petitioner feel that Judge Lasker may be charged with an obvious disregard of the law, since there is precedence for the referral of judicial issues to administrative agencies via the doctrine of primary jurisdiction.

However, any judge may fall into error, and Judge Lasker's referral of the issues of the instant case to the Commission has deprived petitioner of a substantial right just as effectively as if it resulted

from arbitrary action, ursupation of power or obvious disregard of the law.

The referral herein "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." LaBuy v. Hawes Leather Co., 352 U.S. 249, 256, and such deprivation cannot adequately be reviewed in the normal course of appeal.

If the District Court in the case below had dismissed Aaacon's petition, on the basis of primary jurisdiction of the Commission, Aaacon could have appealed. Or, if the District Court had decided the case on the merits in favor of respondents, Aaacon would have its remedy on appeal from any such final judgment. In other words, if the District Court had exercised its jurisdiction by deciding the case, whichever conclusion was reached on the primary jurisdiction of the Commission could have been reviewed by the aggrieved party in the normal course of appeal.

However, the referral procedure adopted here places Aaacon in a predicament " where appeal is clearly an

inadequate remedy ", Ex Parte Fahey, 332 U.S. 258, 260. Aaacon is remitted to the posture of awaiting the outcome of a time-consuming proceeding before the Commission which will greatly delay and postpone the decision in this litigation.

Aaacon has neither sought nor desired this type of disposition which has been consented to by respondents. Under the circumstances, it is reasonable to expect that the respondents will appear in Judge Lasker's behalf and that he will not find it necessary to personally justify and defend his actions as a judge. Furthermore, petitioner has notified the Interstate Commerce Commission of the instant application for a Writ of Mandamus and has invited the Commission to intervene as a party, if it so desires, to make known its views on the issue of primary jurisdiction. It is hoped their initiative in this regard would also obviate the need for Judge Lasker to respond personally.

The instant application is based on "the traditional use of the writ in aid to appellate jurisdiction both at common law and in the Federal

courts...to compel (an inferior court) to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Association, 319 U.S. 21, 26. The decision of the District Court holding the case in abeyance "is not a 'final judgment' in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action and not by writ to review what has been done." Railroad Company v. Wiswall, 90 U.S. 507, 508. It is the refusal to exercise judicial power which it is the function of mandamus to correct.

I

DISCRETIONARY DOCTRINE OF PRIMARY JURISDICTION IS INAPPLICABLE IN LIGHT OF THE CONGRESSIONAL MANDATE FOR A SPEEDY TRIAL OF THE ISSUES IN THE INSTANT CASE

The doctrine of primary jurisdiction is a judge-made, discretionary doctrine to be applied by courts in appropriate cases. However, research has uncovered no case in which the doctrine of primary jurisdiction has ever been applied in the presence of a legislative mandate directing the courts to immediately hold a trial on the issues in question, such as obtains in the instant case.

Primary Jurisdiction Is Not Applicable Where Congress Mandates A Speedy Trial

In the instant case, Aaacon has sought an order directing arbitration pursuant to 9 U.S. Code Section 4. That section, in relevant part, authorizes the Federal courts to direct parties to arbitrate after reviewing the contract in question:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed..."

Congress has gone on to mandate that the courts themselves try forthwith any dispute concerning the validity of the arbitration agreement:

> "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." * (Emphasis added.)

It is clear from the above quoted language from 9 U.S. Code Section 4 and from the legislative history discussed below, that the Congress of the United States has mandated that it is the Federal courts which shall have authority and jurisdiction over questions relating to the validity, making and enforcement of agreements to arbitrate regarding shipments in interstate commerce.

---

*Congress was even explicit in mandating conditions under which jury trials should be provided:

> "If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose." 9 U. S. Code Section 4.

Moreover, the Congress of the United States has by clear and unequivocal language indicated not only that the courts shall act but also that a speedy trial shall be had. It should be noted that the above-quoted language does not provide for merely a "summary trial", but rather directs the court to "proceed summarily" to a trial of the issue of validity or the making of the agreement. Accordingly, the discretionary judge-made doctrine of primary jurisdiction which contemplates the delay and suspension of judicial determination by sending the matter to an administrative hearing is neither applicable nor appropriate.

Thus, the court in Mercury Motor Express v. Brink, 475 F2d 1086 (5th Cir. 1973), in holding that the doctrine of primary jurisdiction was inapplicable, looked to whether the legislature intended to provide for speedy court trial of the issues there in question. Unlike in the instant case, where the statute, 9 U.S.C. Section 4 is explicit on its face, the statute in the Mercury case required a review of the legislative history to find the Congressional intent for a speedy court trial:

"The judge-made doctrine of primary

jurisdiction comes into play when a court and an administrative agency have concurrent jurisdiction over the same matter, and no statutory provision coordinates the work of the court and of the agency. The doctrine operates, when applicable, to postpone judicial consideration of a case to administrative determination of important questions involved in an agency with special competence in the area.

* * *

"An analysis of the purposes of the 1965 amendment which became the present Section 1017(b)(2) further confirms the inappropriateness of applying the primary jurisdiction doctrine in this type of litigation. A major purpose was to hasten enforcement procedures in cases of clear violations...Before 1965 only the ICC could sue to enjoin unlawful operations; the 1965 amendment allowed broader use by the ICC of this enforcement method by modifying requirements for service of process and, in addition, for the first time gave injured private parties the right to 'apply directly to the courts for injunctive relief' without the necessity of prior, potentially time consuming administrative proceedings. Commenting on the 1965 amendment, Congressman Oren Harris, Chairman of the Committee, made clear the congressional intent to avoid delay in the procedure created and to provide a relatively speedy remedy:

> '...We firmly believe this new enforcement tool will be a good one. It should not be subverted by any practice which will avoid or delay prompt settlement of the issues.' 111 Cong. Rec. 9679

"Judicial application of the primary jurisdiction doctrine would re-route plaintiffs

> through administrative proceedings the amendment entitles them to avoid and permit a delay of precisely the type that Congress sought to eliminate in cases of clear violations." (Emphasis added) Id at 1091, 1094

It therefore follows that in both the Mercury Motor case and the instant case, since the discretionary doctrine of primary jurisdiction would necessitate delaying a trial of the issues with a concomitant delay in the relief of speedy arbitration being sought, it is inappropriate.

Additionally, the legislation considered by the court in the Mercury Motor case is very much like the Federal Arbitration Act here in question, in that it specifically required the courts to entertain jurisdiction in an enumerated situation. The court in Mercury Motor in speaking of this "thoughtfully designed procedural provision" said it "strongly suggested that Congress intended to supersede and replace the judicial primary jurisdiction doctrine in 1017(b)(2) suits." No less can be said of the purposes clearly evidenced in the language of the Federal Arbitration Act.

Thus, a review of the legislative history of the Federal Arbitration Act, as well as its explicit

language above considered, demonstrates that the purpose of the act was to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce. It is clear that Congress intended the Federal Arbitration Act to apply specifically to interstate shipment of goods. Accordingly, in the Congressional reports on the Federal Arbitration Act, it was noted that:

> "...the control over the interstate commerce (one of the basis for the legislation) reaches not only the actual physical interstate shipment of goods, but also contracts relating to interstate commerce." HR Rep. No. 96, 68th Cong. 1st Sess. 1. (Emphasis added.)

The instant dispute, clearly involving "the actual physical interstate shipment of goods" is entitled to the procedural mode of determining disputes which Congress provided in the Federal Arbitration Act.

Historically, the Federal Arbitration Act was specifically passed to reverse a trend in the English and American law by which the courts refused to enforce agreements to arbitrate. The purpose of the Act is to enforce speedy and summary compliance of agreements to arbitrate. The Act was passed to overcome the reluctance and hostility of the Courts to enforce arbitration agreement.

Accordingly, in Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F2d 202, 407-10 (2nd Cir. 1959) this Court said:

> "Thus we think the text of the Act and the legislative history demonstrate that the Congress based the Arbitration Act in part on its undisputed substantive powers over commerce and maritime matters. To be sure much of the Act is purely procedural in character and is intended to be applicable only in the federal courts. But Section 2 declaring that arbitration agreements affecting commerce or maritime affairs are 'valid, irrevocable, and enforceable' goes beyond this point and must mean that arbitration agreements of this character, previously held by state law to be invalid, revocable or unenforceable are now made 'valid, irrevocable and enforceable.' This is a declaration of national law equally applicable in state or federal courts."
>
> * * *
>
> "We, therefore, hold that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable, and enforceable' created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of

> validity, revocability and enforceability of arbitration agreements affecting commerce...
>
> * * *
>
> "Once it is settled that arbitration agreements are 'valid, irrevocable and enforceable' we know of no principle of law that stands as an obstacle to a determination by the parties to the effect that arbitration should not be denied or postponed upon the mere cry of fraud in the inducement, as this would permit the frustration of the very purpose sought to be achieved by the agreement to arbitrate, i.e. a speedy and relatively inexpensive trial before commercial specialists." (Emphasis added.)

It is therefore clear that not only the explicit language of 9 U.S. Code Section 4, but the legislative history as well demonstrates a policy inconsistent with the delays and postponements associated with primary jurisdiction.

Another Judge-Made Discretionary Doctrine Similar To Primary Jurisdiction, Has Likewise Been Subordinated To Clear Legislative Language of 9 U.S. Code Sec. 4.

In a similar instance, this Court has recently decided that a discretionary judicial doctrine, similar to primary jurisdiction -- forum non conveniens -- could not be applied in light of the strong Congressional purpose indicated in the above-quoted language of the Federal Arbitration Act 9 U.S. Code Section 4. In Anacon v. Ninfo, 490 F.2d 83 (2d Cir. 1974) which was decided

subsequent to Judge Lasker's decision, this Court noted that the specific language enacted by the Congress precluded the use of that discretionary judicial doctrine. In Ninfo, the New York Federal District Court granted respondent's motion to transfer the matter to the Wisconsin District Court on the grounds of forum non conveniens. The Second Circuit disapproved, saying:

> "Since the agreement on its face provides for arbitration in New York and since the petition was filed in the Southern District of New York, the statute mandates that the court below proceed summarily to a trial of the issues as to the making of the agreement. Aacon Auto Transport, Inc. v. Teafatiller, 334 F. Supp. 1042, 1044 (S.D.N.Y. 1971); Lawn v. Franklin, 328 F. Supp 793 (S.D.N.Y. 1971). It follows that the court below lacked the power to order the transfer of the case to Wisconsin. See Farrell v. Wyatt, 408 F.2d 662, 664-65 (2d Cir. 1969)." (Emphasis supplied.)

Thus, the judge-made discretionary doctrine of forum non conveniens was deemed inapplicable in light of the express Congressional mandate of the Federal Arbitration Act. The discretionary doctrine of primary jurisdiction is likewise inappropriate in light of the clear and unequivocal mandate of the Federal Arbitration Act and the court trial mandated thereunder by Congress to be "summarily" effectuated.

II

CONGRESS HAS MANDATED THE COURTS, NOT ADMINISTRATIVE AGENCIES, WITH DETERMINATION OF THE ISSUES IN QUESTION

The doctrine of primary jurisdiction is a device by which the courts seek to order the distribution of work between judiciary and executive branches of the government in the absence of Congressional direction thereon. However, the doctrine of primary jurisdiction is obviated when Congress has preempted by legislation what had previously been a question of allocation of work between the courts and administrative agencies and has spoken on the issue of which body shall make a determination.

Thus, aside from the Congressional directive of a speedy court trial on questions of validity or enforcement of arbitration agreements under U.S. Code Section 4, the remainder of the language of that section constitutes an express Congressional direction to the courts, as opposed to administrative agencies, to determine the question of the validity and enforceability of arbitration agreements. Cf. Robert Lawrence Co. v. Devonshire Fabrics, Inc., supra, and Aacon Auto Transport, Inc. v. Ninfo, supra. The Arbitration Act not only confers jurisdiction upon the Federal District

Courts, it mandates that the courts accept jurisdiction.

The Supreme Court of the United States, in California v. Federal Power Commission, 369 U.S. 482, 487-90 (1962), considered a case involving the right of the Federal Power Commission to make a determination under the antitrust law where one of the parties had sought a determination in the courts. The Supreme Court there held that the doctrine of primary jurisdiction has a reverse corollary -- the courts may not await administrative advice where Congress had specified the courts should make the decision:

> "We do not decide whether in this case there were any violations of the antitrust laws. We rule only on one select issue and that is: should the Commission proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of that transaction under the antitrust laws? We think not. We think the Commission in those circumstances should await the decision of the courts.
>
> * * *
>
> "It is not for us to say that the complementary legislative policies reflected in Section 7 of the Clayton Act on the one hand and in Section 7 of the Natural Gas Act on the other should be better accommodated. Our function is to see that the policy entrusted to the courts is not frustrated by an

> administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. Texas & Pac. R.R. v. Abilene Oil Co., 204 U.S. 426. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission." (Emphasis added)

The foregoing reasoning of the Supreme Court is directly applicable to the instant facts. In the instant case, Congress has delegated to the courts the authority to make determinations concerning the validity and enforceability of arbitration agreements 9 U.S. Code Section 4. A Congressional direction to the courts to decide issues cannot be frustrated by reference to an administrative agency, and the policy favoring arbitration, whose enforcement Congress has entrusted and directed to the courts, properly belongs in the jurisdiction of the Federal courts.

The requirement that the District Courts decide issues properly placed before them and within their cognizance, is clearly shown in New York, Susquehanna & Western R.R. Co. v. Honorable Frederic v. Follmer, 254 F.2d 510, 511, 512 (3d Cir. 1958), where the Third Circuit Court of Appeals granted mandamus to require the District Court

to make its own decision. That case involved the division of receipts from joint through-rates established by agreements. The Circuit Court of Appeals, after emphasizing that referrals to administrative agencies should be very sparingly used by District Court Judges, went on to state:

> "...Not every litigation of this nature includes subject matter of the sort which makes reference to administrative expertise a necessary or desireable procedure. See Great Northern R.R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922)
>
> * * *
>
> "We think the compelling reason for granting petitioner's prayer (for mandamus) is that this case, properly tried to the District Court, was submitted to that Court for adjudication and presents problems which are well within the ordinary province of a judge to solve. That he is under obligation to solve them we think is pretty clearly indicated..." (Emphasis supplied.)

Similarly, in the instant case, the right to a court trial on the question of validity of an arbitration provision is a statutory right which is entitled to enforcement in the manner which Congress delineated. The doctrine of primary jurisdiction should not be used to defeat this right. Cf. Robert Lawrence Co. v. Devonshire Fabrics, Inc., supra, and Aaacon Auto Transport, Inc. v. Ninfo, supra.

III

THE ISSUE BELOW IS SOLELY A QUESTION OF LAW. THEREFORE, THE DISCRETIONARY DOCTRINE OF PRIMARY JURISDICTION CANNOT BE APPLIED

Primary jurisdiction has no application when the issue before the court is solely a question of law:

> "The primary jurisdiction doctrine has no application where only a question of law is involved. That is, the doctrine does not apply in relation to a question which, while properly determinable by an administrative tribunal, does not involve a question of fact, but one of pure law, is determinable apart from the exercise of administrative discretion, and the requisite uniformity of determination is attainable otherwise than by confining determination of the question to the administrative tribunal..." 2 Am Jur 2d, Administrative Law, Sect. 973. (Emphasis added.)

Assuming arguendo that there were no clear Congressional directive of a speedy court trial, and that the Federal Arbitration Act were not determinative of the courts responsibilities and jurisdiction, the question being considered below is one to which the doctrine of primary jurisdiction is, nevertheless, inappropriate because it is solely a question of law over which the courts both have competence and have already asserted that competence.

The basic issue being considered below was whether or not 49 U.S. Code 20(11) of the Interstate

Commerce Act precludes the arbitration agreement in question. Previous cases have held that where, as in the instant case, the issue is solely a question of law, the doctrine of primary jurisdiction does not apply.

In Ratner v. Chemical Bank, 300 F. Supp. 983, 986 (SDNY 1970) the Court stated:

> "When there is no dual jurisdiction between the District Court and the administrative agency, the doctrine of primary jurisdiction does not operate."
>
> * * *
>
> "Even assuming arguendo that the board does have concurrent jurisdiction here with the District Court, the doctrine of primary jurisdiction is nevertheless inapplicable. As stated previously, the facts in the controversy are essentially not in dispute. What is involved here is the question of law...when only a question of law is involved, the doctrine is not applicable. Rather, the District Court will retain jurisdiction since the administrative agency's expertise in a particular field, which would be useful in resolving complicated questions of fact, is not required. See Federal Maritime Board v. Isbrandtsen, 356 U.S. 481, 521 (1958); United States v. Western Pacific R.R. Co., 59, 62-70 (1956); N.Y. Susquehanna & Western R.R. v. Follmer, 254 F. 2d 510 (3rd Cir. 1958); 2 Am Jur 2d Administrative Law Sect. 793."

Similarly, in China Fire Insurance Co. v. Davis, 50 F2d 389, 392 (2d Cir. 1931) case, Judge Learned Hand speaking for the Court denied the

applicability of primary jurisdiction:

> "There remains the question where this is a matter which belongs primarily to the Interstate Commerce Commission, and which the Courts will not consider until the Commission has acted...
>
> * * *
>
> "...but where it is necessary only to construe the statute or indeed a public tariff (Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285), we need not await the action of the Commission..."

The issue before the Court below in the instant case does not involve questions of rate-making, tariff rates, their application or cost-allocation -- all complex issues requiring specialized agency knowledge. Rather, the instant case turns on legal principles, i.e., whether 49 U.S. Code Section 20(11) precludes the arbitration clause in question. The courts themselves are completely competent to resolve this question of law. Cf. Marine Transport v. Dreyfus, 284 U.S. 263 (1931); Aaacon Auto Transport, Inc. v. Levine, 456 F2d 1335 (2nd Cir. 1971); Aaacon Auto Transport, Inc. v. Jacobson, Docket No. 72-1197 (3rd Cir. 1973).

The cases cited by Judge Lasker in his decision of June 14, 1973, Southwestern Sugar & Molassas Co., Inc. v. River Terminals Corp., 360 U.S. 411 (1958) and U.S. v. Western Pacific R.R., 352 U.S. 59 (1956),

were cases involving rate-making and complex cost-allocation issues. This is not so in the instant case and primary jurisdiction is not an appropriate doctrine. Accordingly, the Court in Western Pacific noted at p.69:

> "By no means do we imply that matters of tariff construction are never cognizable by the courts. We adhere to the distinctions laid down in Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, which called for a decision based on the particular facts of each case...In many instances construing the tariff does not call for examination of the underlying cost-allocation which went into the making of the tariff in the first instance." (Emphasis added.)

So too, in Louisiana & Arkansas Ry. Co. v. Export Drum Company, Inc., 359 F. 2d 311 (5th Cir. 1966) where the major issue was solely over the meaning of words in the railroad's tariff, the Court stated at p. 314:

> "The purpose of the tariff is clear, even to layman; and if any tariff can be construed without reference to the underlying cost-allocation factors, this is one. Under these facts, courts are as competent as the Commission to interpret the tariff."

The above cases hold that a District Court is fully competent to decide the legal issues without recourse to the Interstate Commerce Commission, when the issue does not involve specialized commission knowledge

regarding the structure of rates and cost-allocations.

The instant case is even more clear-cut since the question of law that the courts must pass on is the mandate of Congress, which Congress has placed squarely and solely within the jurisdiction of the Federal courts and with whom they have charged and entrusted the enforcement. Further, as shown elsewhere in this brief, it is a question which the courts have already deemed appropriate for their determination and upon which the courts have already passed regarding the very issues here in question.

IV

PRIMARY JURISDICTION IN THE INSTANT CASE WOULD BE AN INAPPROPRIATE EXERCISE IN FUTILITY

The Issues Which The Court Below Would Refer To The Interstate Commerce Commission Have Already Been Determined By The Appropriate Federal Courts

The doctrine of primary jurisdiction is a device whereby courts may obtain the advice of an administrative agency before deciding the issues. The ultimate responsibility of course belongs to the court. Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 441.

However, the Federal courts have already spoken regarding the very issues before the Court below: the validity and enforceability of this arbitration clause in light of 49 U.S.C. 20(11).

In the landmark case of Marine Transit Co. v. Dreyfus, 284 U.S. 263 (1931), the Supreme Court of the United States upheld and enforced a provision for arbitration incorporated by reference in a carrier's bill of lading under the authority of the Federal Arbitration Act.

More recently, in Indussa Corporation v. S.S. Ranborg, 377 F.2d 200 (2nd Cir. 1967), this

Court considered the application of the Federal Arbitration Act to the Carriage of Goods by Sea Act (COGSA) 46 U.S. Code 1303(8) -- which provides with respect to water carriers, the same legislation that 49 U.S. Code 20(11) provides for motor carriers. The Court there stated at p. 204:

> "Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained. (See Lowry & Co. v. S.S. Le Moyne D'Iberville, 253 F. Supp 396 (S.D.N.Y. 1966), appeal dismissed for want of jurisdiction, 372 F. 2d 123 (2nd Cir., 1967), slip opinions 1103, and cases cited.) Although the Federal Arbitration Act adopted in 1925, 43 Stat. 883, validated a written arbitration provision 'in any maritime transaction', Sec. 2, and defined that phrase to include 'bills of lading of water carriers', Sec. 1, COGSA, enacted in 1936, 49 Stat. 1207, made no reference to that form of procedure. If there be any inconsistency between the two acts, presumably by the Arbitration Act would prevail by virtue of its re-enactment as positive law in 1947, 61 Stat. 669. See Knauth, Ocean Bills of Lading, supra, at 238-239." (Emphasis added.)

To reiterate, the Carriage of Goods by Sea Act considered in Indussa provides the same legislation for water carriers as 49 U.S. Code Section 20(11), the

legislative provision here in question. Additionally, 49 U.S. Code Section 20(11) was enacted into law even earlier and, thus, the supremacy of the Federal Arbitration Act is even clearer, under the reasoning of Indussa.

The Indussa case has been followed by Federal District Courts in sustaining the validity and enforceability of arbitration agreements contained in bills of lading in like circumstances. Mitsubishi Shoji Kaisha Ltd. v. M.S. Galini, 323 F. Supp. 79 (S.D. Texas 1971). See also: Saxis S.S. Co. v. Multifacs Intern. Traders, Inc., 375 F.2d 577, (2d Cir. 1967); Eastern Marine Corp. v. Fukaya Trading Co., S.A., 364 F.2d 80 (2d Cir. 1966) cert. den. 385 U.S. 971. In re Pahlberg Petition, 131 F.2d 968 (2d Cir. 1942); In re Utility Oil Corporation, 69 F.2d 524 (2d Cir. 1934).

More specifically, considering the facts of the instant case, in the many cases which have tested this issue, the courts have unanimously held that the provision contained in Aacon's bill of lading is lawful, valid and enforceable and does not contravene the provisions of 49 U.S. Code 20(11).

In the case of Aaacon Auto Transport, Inc. v. Levine, Docket No. 71-2100, SDNY 1971, the Court (per Ryan, J.) held in relevant part:

> "and it further appearing that Title 9 U.S. Code Section 4 is applicable and appropriate to said contract and applicable and appropriate to claims arising from interstate transport of vehicles... and it further appearing that arbitration of disputes under said Carmack Amendment is proper, and it further appearing that the agreement to arbitrate is consistent with the tariff provisions of petitioner-carrier and the Uniform Bill of Lading." (Emphasis added.)

Thereafter, Judge Ryan's order was reviewed and upheld by this Court, 456 F.2d 1335 (2d Cir. 1971). The arguments posed to the Second Circuit Court of Appeals were:

1. The arbitration provision contained in the agreement deprives appellant Levine of his right to a judicial determination.

2. The agreement to arbitrate is contrary to the provisions of the Uniform Bill of Lading.

3. The arbitration agreement is contrary to the provisions of Aaacon's tariff.

The Second Circuit Court of Appeals upheld the arbitration provision over the foregoing contentions.

Subsequent to that decision, the United States District Court for the District of New Jersey

(per Lacey, J) in reviewing the same arbitration provision as is here in question in Aaacon Auto Transport, Inc. v. Jacobson, Docket No. Civ. 1733 - 1971, held:

1. that the arbitration provision in Aaacon's bill of lading was not at variance with the terms of the Uniform Straight Bill of Lading.

2. that the arbitration provision was not at variance with Aaacon's tariff rule so making the Uniform Straight Bill of Lading "a part" of Aaacon's tariff.

3. that the provision for arbitration in New York was lawful and proper under 49 U.S.C. 20(11); and

4. that the arbitration provision was just, reasonable and proper and effectuated "the intent of Congress" as set forth in the Federal Arbitration Act 9 U.S.C. Sec. 1 et seq.

On appeal, the Third Circuit Court of Appeals confirmed Judge Lacey's decision. The following questions were posed to the Third Circuit:

"1. Is the contract in question providing for arbitration void as unconscionable and inequitable?"

"2. Does the contract in question violate the Interstate Commerce Act?"

"3. Does arbitration oust the courts of jurisdiction?"

"4. Does use of the terms and conditions of the Uniform Bill of Lading permit the arbitration provision in question?"

The Third Circuit similarly upheld the lawfulness and

validity of the arbitration provision in question. Aaacon Auto Transport, Inc. v. Jacobson, ____F.2d _____(3d Cir. 1973) Docket No. 72-1197.

Moreover, Federal courts throughout the United States have similarly reviewed the bill of lading provision in question and, without referral to the Interstate Commerce Commission and without resort to the doctrine of primary jurisdiction, have determined and upheld its validity. In not one case in which the arbitration provision has been considered by a Federal District Court or Court of Appeals has it been deemed invalid or unenforceable:

I FEDERAL DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Frost Rental and Leasing System, Inc. v. Aaacon, 71 Civ. 757 (per Flores, J) Federal District Court stayed litigation pending before that Court in California, pending arbitration in New York. Claimant was a California resident.

II FEDERAL DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Atlantic and Pacific Leasing v. Aaacon (per Schacke, J.) Federal District Court of California stayed litigation pending before that Court until arbitration is had in New York. Claimant was a California resident. Commenced action in California.

III FEDERAL DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Bruno v. Aaacon Auto Transport, Inc., 71 Civ. 147 (per Leib, J.) Litigation in Federal District Court in Florida stayed pending arbitration in New York. Claimant a Florida resident.

IV FEDERAL DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Aaacon Auto Transport, Inc. v. Schwarz, 71 Civ. 2752-G (per Gerritz, J.) upheld arbitration agreement. Claimant was a Massachusetts resident.

V FEDERAL DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Segelin v. Aaacon Auto Transport, Inc., 71 Civ. 40 (per Lambros, J.) staying litigation pending in Federal Court until arbitration is had in New York. Claimant was an Ohio resident.

Mayer v. Aaacon Auto Transport, Inc., 72 Civ. 546 (per Thomas, J.) stayed litigation commenced in Ohio pending arbitration in New York; claimant was a California resident.

As was noted by American Law Reports Annotated, 12 ALR 3d 892, 897, the courts in enforcing the arbitration agreement must of necessity have passed on the validity of that agreement:

> "A distinction must be observed between validity and enforceability of the agreements under consideration because as was the case at common law with agreements to arbitrate future disputes, an agreement can be considered valid yet unenforceable while, on the other hand, it can hardly be said that a court could consider an agreement enforceable in some way without, by necessary implication, deeming that agreement valid. Thus, many courts have

> discussed agreements such as are herein considered in terms of enforceability, with no special reference to validity, while other courts have spoken directly on the issue of the validity of the agreement...Cases which by necessity, inasmuch as they have considered the agreement in some way enforceable, support the proposition that the agreement is valid have been cited for this proposition even though these cases have not spoken for the validity but have talked rather in terms of enforceability of the agreement." (Emphasis added.)

Recently, the United States District Court for the Southern District of New York in Aaacon Auto Transport, Inc. v. Mayer, 72 Civ. 4211 (per Ward, J.) considered each of the same arguments which were presented by Continental below, including part of the Commission proceedings which were annexed to the pleadings. The Court did not invoke the doctrine of primary jurisdiction and rejected the arguments against the validity of the arbitration provision.

Finally, in a most recent decision, this Court in Aaacon Auto Transport, Inc. v. Ninfo, 490 F.2d 83 (2d Cir. 1974), cited with approval Aaacon Auto Transport, Inc. v. Teafatiller, 334 F. Supp. 1042 (SDNY 1971). In the Teafatiller case the Court (per Bricant, J.), after upholding the validity and applicability of the arbitration provision in question,

noted that arbitration is "particularly well suited" to the settlement of disputes involving driveaway shipments, as arose in the instant case.

Aaacon respectfully submits that the foregoing cases demonstrate that many courts have carefully and meticulously considered the questions raised below on many occasions and that these questions, being purely a matter of law, have been answered by the courts themselves.

In this regard, it is noted that the doctrine of primary jurisdiction is a judicial doctrine which the courts must apply if appropriate, sua sponti, even when the issue is not raised by the parties. Thus, in Louisiana and Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311 (5th Cir. 1966) the Court stated at p. 314:

> "Although this issue (doctrine of primary jurisdiction) apparently was not raised by counsel for either party at any state of the proceedings, we must apply the doctrine if it is applicable, for, being a question of proper allocation of business between the courts and the administrative agencies, it is not subject to waiver."

In light of the multitude of occasions in which the courts have considered this very arbitration clause, and then decided the issue themselves without referral to the

Interstate Commerce Commission, the courts have had to determine that the doctrine of primary jurisdiction did not apply.

Furthermore, inasmuch as this is not a case of first impression, and the courts have already considered and spoken with regard to the lawfulness and validity of the arbitration clause in question on the issues raised below, the need for a preliminary referral to an administrative agency is clearly obviated and unnecessary. In the instant case, it would not be a doctrine of primary jurisdiction that would be invoked, but more likely a doctrine of administrative review of judicial decisions -- certainly, a most unhappy and improper state of affairs.

V

SOME SUBSTANTIVE ISSUES TO BE DETERMINED BY THE COURT BELOW

Aaacon respectfully notes that the question before this Court is solely the propriety of the application of the doctrine of primary jurisdiction to the instant case, i.e., whether the Court below should make its own decision regarding the application of 9 USC Section 4. However, so that this Court may have a fuller picture of this matter, Aaacon wishes to briefly discuss two substantive issues properly for determination by the Court below: situs of arbitration, and the fairness of arbitration.

The Venue of Arbitration Has Been Preempted by Congress

The specific language of the Federal Arbitration Act provides, by its terms, for the complete disposition of the question of the venue in arbitration proceedings, as more fully discussed below. In this regard, Aaacon first notes that there is no question that the process of arbitration is lawful, valid and appropriate to the disposition of disputes in interstate commerce 9 USC Section 2.*

*Indeed, the Interstate Commerce Commission's position on arbitration, while not relevant to the issues before this Court, accords with the almost universal

Once it is conceded that arbitration is lawful with regard to shipper claims, a determination of the question of venue of arbitration is "an exercise in futility" because the determination thereof has been preempted by Congress. This obtains from the fact that the language of the Federal Arbitration Act itself mandates that the court in which the petition for arbitration is filed must order arbitration to be held in that district.

---

*favor that arbitration has found for the settlement of disputes:

In Ex Parte 263, 340 ICC 515, (1972) the Commission stated:

> "The use of arbitration by (shippers and carriers), rather than resort to a court of law, is not proscribed by any portion of the Interstate Commerce Act." (Emphasis added) Id at 582.

The Commission also noted the practical benefits of arbitration:

> "Thus, it is fair to say that arbitration can provide a sensible system for the speedy, just, and economical disposition in a relatively amicable manner of unavoidable disagreements." Id at 579.

In Continental Grain Co. v. Dant & Russell, Inc., 118 F2d 967, 968, 969 (9th Cir., 1941) where a petitioner invoked the jurisdiction of the Federal Court for the District of Oregon to enforce an arbitration agreement which, by its terms provided for arbitration in New York, the court directed that arbitration be held in Oregon since the Arbitration Act requires and permits arbitration to be held only within the jurisdiction of the Court where the petition was filed. In that case the Court stated:

> "...The statute expressly provides that the hearing and proceeding shall be within the district in which the petition for the order directing arbitration is filed..."
>
> * * *
>
> "The appellant challenges the right of the court to order the arbitration within the district of Oregon because such an order does not conform to the agreement of the parties for an arbitration in New York. Prior to the enactment of the United States arbitration act (1925) such agreements could not be enforced in the courts of the United States. If there could be any doubt of the power of the legislature to limit the right of arbitration to one conducted within the jurisdiction of the district court ordering the arbitration it must be dispelled by the consideration that Congress could attach any limitation it desired to the right to enforce arbitration in the Federal courts..." (Emphasis added) Id at p. 969.

Accord: Aaacon Auto Transport, Inc. v. Florence Ninfo, 490 F2d 83 (2nd Cir., 1974) Docket No. 73-1986.

Similarly, in China Union Lines v. Steamship Co. of 1949, 136 F. Supp. 597, 599 (SDNY, 1955) the Court held in a case involving an arbitration agreement providing for arbitration in New York, that inasmuch as the parties filed their petition in Texas, the mandate of Congress in 9 U.S. Code Section 4 required that arbitration be held in Texas. That is, that the Congressional enactment in the Federal Arbitration Act superseded and preempted the question of the place arbitration was held:

> "Arbitration proceedings are now governed by a specific statute -- Title 9 U.S.C.A. Section 1-14. It is respondent's contention that sections 4 and 8 of the arbitration statute have a decisive effect upon the motion at bar.
>
> Section 4 provides, in part, as follows:
>
> > 'The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.'
>
> "Thus, respondent argues that the plain wording of the statute requires that any arbitration in accordance with the terms of the agreement 'shall be within the district' in which the petition for an order directing such arbitration is filed.

> "As appears from the foregoing chronology of the proceedings, libellant filed its petition for an order directing arbitration in the Southern District of Texas. It did not file a similar petition in this district. The only district within which the arbitration could proceed by force of a petition and court order would be the Southern District of Texas." (Emphasis added)

Thus, had the agreement in the instant case not made any provision for the place of arbitration, had the place of arbitration not been authorized by Aacon's Tariff Rule 20, arbitration in New York would be required in the instant case because Congress has directed the place of arbitration be the place where the petition is filed.

The Arbitration Which Aacon Seeks Is Not A Burden To The Parties And Is Fair And Equitable

Although Aacon is cognizant of the fact that the sole issue before the Court of Appeals is whether the Court below erred in failing to determine the issue presented to it, Aacon submits for the Court's consideration the fact that the provision in question providing for arbitration in New York is not only valid but also that it is not a burden to any claimant.

Neither the claimant, his witnesses nor his attorneys need ever appear in New York. First,

arbitration under the agreement here in question may be had on documents alone by both sides. Second, in arbitration, unlike in court trials, no attorneys are necessary for the shipper to assert a claim. Arbitration thus contrasts favorably to the expensive, time consuming pre-trial and trial procedures, attorney's fees and costs of court litigation.

Under the arbitration provision in question no witnesses need appear in person, because the arbitration provision makes the application of New York rules of evidence available "at the request of either party", and under the New York rules of evidence written depositions are admissible for testimony of any person residing out of state, or over 100 miles from the forum without the necessity of personal appearance by the parties, or their witnesses. New York CPLR 3117 provides:

> "The deposition of any person may be used by any party for any purpose...provided...
>
> (ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state..."

Thus, the arbitration provision permits and authorizes presentation of a claim in arbitration on purely documentary evidence in all cases where the

parties would be inconvenienced by the situs of arbitration. As a result, no claimant shipper, his witness or his attorney need ever travel a great distance to arbitrate. This is perhaps a key component of arbitration pursuant to the rules of evidence of New York.

A claimant and his expert witnesses, if any, need travel no further than the nearest notary public to present a claim and have it determined.

This lack of need to travel or bring witnesses to New York has been recognized by Federal District Courts enforcing the arbitration provision. Thus, in Aaacon Auto Transport, Inc. v. Gale, (SDNY, 1972) 72 Civ. 239, the United States District Court for the Southern District of New York stated in its decision, per Frankel, J.:

> "The movant (Aaacon) recognizing the potential hardship to a California automobile owner, points out that 'Arbitration may be had on documents alone, without hardship to either party.' With this understanding, the motion to compel arbitration will proceed solely upon written submissions for the parties. Filing fees will be paid initially by petitioner herein subject to the ultimate award of the arbitrator."

Furthermore, no attorneys are needed to arbitrate disputes, thus ending one of the most common complaints of shippers -- that attorneys' fees (which are not compensable as part of a damage claim against a carrier) often take a large portion of any recovery against a carrier, thereby reducing a claimant's recovery. Cf. Miller, Law of Freight Loss and Damage Claims, p. 346, to the effect that attorneys' fees are not recoverable in claims for interstate movement of goods.

Supporting the fact that arbitration can be on documents alone for the convenience of the parties regardless of the situs of arbitration, is an article in the New York Law Journal of May 8, 1972, annexed hereto for judicial notice. The article indicates that arbitration has been recognized as appropriate to shipper claims by Secretary of Transportation Volpe, and suggests that "the standard procedure would call for hearings on documents only..." * Additionally, the article recognizes that arbitration could be part of the standard shipping contract of the carrier.

---

*Judge Lasker has not displayed any of the hostility to arbitration decried by this Court in Robert Lawrence Co. v. Devonshire Fabrics (supra). However, it appears there may be a residual reluctance to order arbitration in the instant case which may stem from an erroneous belief that arbitration in New York would burden the parties with travel expenses for parties and witnesses as well as additional attorney's fees which, as shown above, is not the case.

CONCLUSION

Congress has directed that the District Court shall determine questions regarding the making and validity of arbitration agreements relating to interstate commerce. Furthermore, Congress has mandated that the District Court shall "proceed summarily" to a trial of these issues. It was error for the District Court to delay determination of the issues raised below pending completion of an administrative proceeding now before the Interstate Commerce Commission.

Therefore, it is submitted that the District Court for the Southern District of New York should be directed to exercise its jurisdiction by deciding the matter which has been brought before it.

Respectfully submitted,

ZOLA and ZOLA
Attorneys for Petitioner

Interstate Commerce Commission

Washington, D.C. 20423

JFH:lh

BUREAU OF TRAFFIC

September 7, 1972

File: 1 - 47021
(or en calls, 343-3870 RIM)

AAACON Auto Transport, Inc.
Mr. Irving Zola, President
147 West 42nd Street
New York, NY 10036

Subject: Tariff, MF-I.C.C. No. 9

Dear Sir:

In those portions of the subject tariff, under Items 10, 15 and 20, where the word: "shall" appears: this should be changed to read: "will" for positive application.

It should be your purpose to reissue the tariff, making the necessary change and filing same with this Commission on statutory notice. A supplement to the tariff making the necessary change would have effect for only a period of six months when the tariff would then necessitate reissuance in order to comply with the provisions of Rule 6(d) as amended by Special Permission No. M-70560 since the volume of the subject tariff consists of only three pages.

Very truly yours,

Charles E. Thompson
Chief, Tariff Examining Branch

lhc: Mr. Mort Kiel
140 Cedar Street
New York, NY 10006

EXHIBIT "A"

Arbitration

By Richard E. Lerner

This column by members of the American Arbitration Association is a regular feature of the LAW JOURNAL. *The author of today's column is associate counsel of the American Arbitration Association, a member of the New York and District of Columbia Bars and has written and lectured extensively on the settlement of disputes. He is secretary of the arbitration committee of the Association of the Bar of the City of New York.*

Arbitration of Claims: New Path for 70's

The resolution of disputes by arbitration is not a new concept to many sectors of the transportation industry. Both motor and rail carriers have employed this approach to allocate losses on interline shipments among themselves through structures built into their major trade associations. And, together with the other major sectors of the American economy, the industry utilizes arbitration in its labor-management relations. However, it was not until very recently that arbitration was seriously considered as a means of coping with the large problem of freight loss and damage claims.

Data compiled by the Association of American Railroads on freight loss and damage in 1970 provide some insight into the immensity of the problem. In 1970, AAR member carriers in the United States, Canada and Mexico reported that total loss and damage was $228,316,389 -- an increase of $18,216,226 or 8.7 per cent over the 1969 total; that the ratio of loss and damage charges to gross freight revenue of U. S. railroads was 1.97 per cent — up from 1.92 per cent in 1969; and, finally, that new claims filed in 1970 rose 6.5 per cent over those filed in 1969.

Trucker Experience

As for motor carriers, the National Freight Claim Council of the American Trucking Associations estimated that $216,800,000 in claims were paid out by the trucking industry in 1970; the ratio of claims paid to revenue constituting 1.56 per cent.

Of course, calculation of the total economic loss to the transportation community, attributable to freight claims, would have to include insurance premiums, overhead, claims handling and processing costs and litigation expenses where necessary.

George M. Stafford, chairman of the Interstate Commerce Commission, has recently noted that: "The consumer . . . as retail purchaser . . . must make up the deficit when carriers have to shell-out well over $300 million in loss and damage claims each year. . . . Many observers of this field estimate that the indirect costs of loss and damage are eight times the actual claims that are paid. This puts an annual toll of over $2 billion on the consumer." The strong economic incentive to consider new methods for resolving disputes over freight claims is clear and compelling.

More Than Dollars

But dollars and cents are not the only reasons for shippers and carriers to examine the feasibility of informal disputes settlement for freight claims -- other forces are at work. The transportation and aeronautics subcommittee of the House Interstate and Foreign Commerce Committee recently suspended further consideration of S. 1653-H. R. 8158 (which provide for payment of reasonable attorneys' fees for successful plaintiffs in freight loss and damage litigation) until shippers and carriers had jointly explored voluntary nonjudicial settlement methods.

The Department of Transportation, in its comments on *Ex Parte* No. 263 before the Interstate Commerce Commission, recommended that the commission

EXHIBIT "B-1"

act to encourage arbitration of loss and damage disputes. In the same proceeding, the ICC's Bureau of Enforcement took a similar position in a statement to its parent by attaching a proposal put forth by the American Arbitration Association which was characterized as ". . . reasonable and workable."

(On Feb. 3, 1972, the ICC decided *Ex Parte* No. 263, a lengthy proceeding which examined the rules, regulations and practices of regulated carriers with respect to the processing of loss and damage claims. The decision, while raising certain procedural and administrative questions, encouraged the voluntary arbitration of freight loss and damage claims.)

Committee Study

The cumulative effect of these developments was the upgrading of formerly intermittent and informal discussions concerning the utility of arbitration for loss and damage claims. In the spring of 1971 the National Industrial Traffic League created an ad hoc committee, chaired by Stanton P. Sender, transportation counsel to Sears, Roebuck & Company, to study the subject. Mr. Sender then invited the American Arbitration Association to join in the work of his committee as a consultant.

For over forty years, the association's experts have devolped new dispute settlement procedures for many of the nation's major business sectors. The American Arbitration Association is a public service, nonprofit, nongovernmental organization dedicated to the resolution of disputes of all kinds through the use of arbitration, mediation, democratic elections and other voluntary methods. It administers through its twenty-one regional offices a wide-ranging annual caseload that last year totaled over 22,000. These cases involved disputes over an indefinite variety of international and domestic commercial matters, construction industry disputes, labor-management controversies in both the public and private sectors and insurance disputes.

The American Arbitration Association does not act as arbitrator. Its function is to submit to parties selected lists of arbitrators from which disputants may make their own choices and to provide impartial administration of arbitration.

Coordinative Center

The association's National Panel of Arbitrators consists of some 30,000 men and women, each an expert in some filed or profession, who have been nominated for their knowledge and reputation for impartiality. These arbitrators serve without compensation except under unusual circumstances. They offer their time and skill as a public service. In sum, the association is the national center of information, education, and especially research and development, on arbitration.

During the summer of 1971, the ad hoc committee, expanded by the inclusion of representatives from the Association of American Railroads, the American Trucking Association and concerned federal officials, invited AAA to submit an arbitration proposal for their consideration. The association drafted a working plan which was reviewed by the broadly based committee. It recommended that the association, in conjunction with the transportation industry, shipper groups and appropriate federal agencies, establish special rules and procedures for voluntary arbitration of loss and damage claims under private, nongovernmental auspices.

It was suggested that the guidelines, modeled on the association's commercial rules, be drawn by a national committee composed of representatives from all sectors of the transportation community which have concerns for freight claims and the AAA. The national committee would also serve to monitor the working of the procedures and suggest revisions as experience may dictate. In addition, committee members could serve as arbitrators while a national panel of arbitrators is being established, with their assistance.

Must Be Agreement

An agreement to arbitrate is the foundation of the procedure. Parties could voluntarily agree to submit an existing dispute to arbitration or their contracts could include a standard arbitration clause which would bring future disputes before an arbitration tribunal. The following clause, reviewed and enforced by courts many times as an appropriate broad arbitration clause, was recomended:

"Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration, upon the demand of either party, in accordance with the commercial rules of the American Arbitration Association and judgment upon the award may be entered in any court having jurisdiction."

The vast majority of freight loss and damage claims are currently resolved by the parties through negotiation and under the carriers' internal claims procedures. This would continue to be true under any arbitration procedure. The association's experience in other commercial-dispute areas indicates that voluntary settlements are expedited and increased when the parties know that resort to arbitration, rather than costly and lengthy litigation, may be had when and if the negotiation process breaks down.

'Demand for Arbitration'

Under this suggested voluntary arbitration procedure, when a dispute arises under any contract which refers to the commercial rules of the American Arbitration Association, the claiming party initiates the arbitration by giving a written notice to the other party setting forth the date of the contract, a brief statement of the

EXHIBIT "B-2"

controversy, and the amount of money involved. Three copies of this notice, called a "demand for arbitration," are sent to the appropriate regional office of the association, together with the appropriate fee established under the rules and the proper supporting papers. The association will then set in motion the proceedings for prompt arbitration hearings on documents or oral hearings.

An initiating letter is sent out by the AAA notifying the respondent that it has received the demand for arbitration. The initiating letter also contains a list of names, submitted to the parties, of potential arbitrators.

The standard procedure would call for hearings on documents only, unless a party requests an oral hearing. Documentary hearings could be held so as to serve the convenience of the parties by utilizing the regional office structure of the association.

To the greatest extent possible, disputes between a single shipper and a single carrier would be grouped and the hearings would run continuously until the entire caseload has been completed. Hearings would be convened when a sufficient caseload had accumulated at each tribunal location around the United States. But in no event shall more than thirty days pass between hearing sessions of the tribunal.

Immediate Decisions

The arbitrators will be required to render their decisions to the association's tribunal administrator the same day that the hearings are held. In this way, the administrator will be able to mail the award (on a specially prepared form) to the parties on the very same day that the award is rendered so that the parties will receive it within forty-eight hours from the date of hearing.

In the event that a party desires an oral hearing, he will so indicate on his demand for arbitration or on his reply thereto. Upon the filing of the demand for arbitration together with the $25 filing fee and the supplementary $50 administrative fee for the oral hearing, the association will then promptly initiate the arbitration as in the documentary hearing procedure. The association will also fix a mutually agreeable hearing date and place.

To reduce costs and to expedite the procedure, it is suggested that multiple disputes be heard by a single mutually agreeable arbitrator. At the request of either party and upon a showing of good cause and upon the payment of any additional fee, the association shall arrange for a three-arbitrator tribunal.

Panel Formula

In order to construct a mutually-agreed-upon panel for each proceeding, it is recommended that the association supply each party with a single list of five arbitrators. If the parties cannot agree upon an arbitrator or panel of arbitrators from such a list, the association should be authorized by the rules to administratively appoint a single arbitrator or a panel as required to conduct the hearing.

Sources of arbitrator recruitment for freight loss and damage claims could include retired shipper and carrier experts, attorneys with substantial transportation law practice, traffic and claims specialists, independent transportation claims adjusters, college faculty members with transportation and traffic expertise and men now active as shipper or carrier employees with reputations for knowledgeability and fairness.

At least at first, the AAA recommends that under the new system, arbitrators not be compensated. This aspect of the project should be carefully evaluated at the completion of the first year. It may evolve that a professional cadre of freight-claim arbitrators will be created who can appropriately be compensated for their services.

Underwriting Costs

Since the American Arbitration Association is a not-for-profit organization, fees for the arbitration services have been set to cover only the costs of administration. The costs of arbitration may be underwritten in several ways.

It is suggested first that consideration be given to a fee schedule that requires the claimant to advance the previously mentioned filing fee together with his demand for arbitration for a hearing on documents. This should deter the filing of unjustified claims. Prior to hearing the respondent would pay a $50 fee. Payment, if any, to the arbitrator, would be charged equally to the parties.

The arbitrator would have the discretion to allocate all costs and fees in the award between the parties as he determines that equity requires.

Alternatively, the major carrier and shipper associations of the industry could provide a fund at the initial stage of this procedure to cover all or part of the administrative fees for one year. A decision based upon one year's experience could be made as to whether to continue this funding system or devise another.

Clearly, this tentative proposal will require testing under actual working conditions with considerable refinement as experience may indicate. Fortunately, experimental projects are not far off. A major West Coast carrier will soon initiate a pilot project which will feature an offer to arbitrate certain claims after they have been twice declined. And a working committee of National Industrial Traffic League and Association of American Railroads leaders are discussing the guidelines of a pilot project for arbitration of rail loss and damage claims.

Arbitration is not suggested as a comprehensive solution to the freight claim problem. However, as Secretary of Transportation John A. Volpe recently remarked, the far more sensible approach to resolving freight-claim controversies would seem to be arbitration rather than litigation.

EXHIBIT "B-5